

752ndelN.txt

19 just not true. In fact, the court's opinion expressly even
 20 includes a quote from the trustee that they have their own
 21 independent consultant that decided and concluded that there
 22 was no one else to take this terminal. His statement to you
 23 that "the airport did nothing," I am sure KCAB will address,
 24 but suffice it to say, your Honor, that there was a massive
 25 amount of evidence in the record in the form of depositions

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

48

752ndelN

Argument

1 taken by White & Case, at which the airport talked about
 2 contacting over 60 airlines on multiple occasions and working
 3 with consultants and doing everything possible to try to see
 4 what else they could do to get the proceeds and fill the space.

5 I just am astonished to hear counsel say that the
 6 record says the airport did nothing. That is completely at
 7 variance with the hearing below, which I know Mr. Shore did not
 8 attend.

9 Your Honor, on the question of what they should and
 10 should not have opposed at trial, it is important to note that
 11 this was not a rushed hearing. There were 40 -- four zero --
 12 days' notice of this hearing below.

13 We gave them all the discovery they wanted. It began
 14 on a rolling basis far before when he said it did. They took
 15 all the depositions they wanted. Our proposed form of order
 16 from day one said that the relief requested included a finding
 17 that the settlement was fair and equitable, and they took a
 18 huge amount of discovery about this. They kept trying to get
 19 the witnesses to admit that maybe there was a better deal out
 20 there, and they got no traction, because it just is not the
 21 truth.

752ndelN.txt

22 As the evidence actually showed, the rent payment
23 equivalents that Delta is paying under the settlement
24 substantially exceed what other tenants are currently paying at
25 the airport, and in fact, but for Delta, there is no one to

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

†

49

752ndelN

Argument

1 take this terminal.

2 In fact, I actually joked at the hearing that if I had
3 known what the deponents would say we never would have cut a
4 deal this generous, knowing that we were really, truly
5 absolutely the only game in town.

6 Your Honor, as to the disclosure statement, quote,
7 saying nothing about this, that is completely untrue as well.

8 You will see from the record below and the argument
9 the disclosure statement had an entire section that described
10 exactly where we were with the settlement, a section that said
11 we will keep trying to settle, and another section that put
12 everyone on notice, and specifically if we settled municipal
13 bond indenture issues in time, the settlement was to be the
14 parties plan distribution.

15 As we argued below and proved below, people got notice
16 of the settlement and got their full package of hundreds of
17 pages of documents weeks, weeks before they had to vote on the
18 plan.

19 To be candid, your Honor, I spoke to Mr. Shore many
20 times yesterday and again this morning. I never heard one
21 word, not one syllable about the boilerplate voting affidavit
22 being contested as evidence. In fact, I've never heard
23 anything about that for weeks since it was filed in the middle

752ndel\n.txt
24 of April until I heard it for the first time on the phone
25 today.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

50

752ndel\n Argument

1 Your Honor, that affidavit was admitted into evidence
2 at the confirmation hearing. They agreed to the admission of
3 all of the evidence and the affidavits. They agreed they did
4 not need to cross-examine anybody. And it was entered into the
5 record.

6 This claim that this affidavit is somehow not
7 admissible is all the more remarkable because one of
8 Mr. Shore's partners e-mailed me and said he wanted to merge
9 the evidentiary record of the two hearings, and we were
10 concerned that that might not be entirely OK.

11 If you look at the record of the confirmation hearing,
12 you will see that. So to allege now that a plain vanilla
13 voting affidavit that they've known about for weeks and they
14 willingly admitted into evidence and waived the right to
15 cross-examine at the confirmation hearing, where I might note
16 they were the only represented objector out of over 200,000
17 parties, is, I think, quite improper.

18 Your Honor, why do they draw you away from the four
19 factors and to what they want to talk about?

20 It's because the four factors show that extraordinary
21 relief is being sought here and that their burden is extremely
22 heavy and that, as the Court below found, they simply don't
23 meet the factors. In fact, they probably meet none of them.
24 This Court has ruled in at least two published decisions that
25 failing to meet any of the four factors is fatal.

752ndelN.txt
SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

51

752ndelN

Argument

1 Even if there is a balancing, I think it's very clear
2 that they do not satisfy the standard.

3 Your Honor, your point that you raised in colloquy is
4 critical. Well over 90 percent of these bonds were bought
5 after the world was on notice that the trustee was negotiating,
6 actually executing and implementing interim compromises of
7 payments when due.

8 Delta paid over \$30 million to the bondholders under
9 these compromises. No party objected. No party alleged lack
10 of authority. But, your Honor, the notices also said we are
11 negotiating towards a definitive deal. No party objected. The
12 notices said everyone is welcome to join the negotiating
13 committee. Many of the notices said that. These parties
14 refused.

15 To now plead to the Court that only two families of
16 bondholders representing only 60 percent of the bonds did the
17 deal when they rejected for over a year the invitation to be
18 part of the process is also I think quite improper.

19 Let me hit Mr. Shore's math, because the 41 percent
20 number that appears in his footnote is totally incorrect. It
21 is true that 168 odd million dollars of bonds voted. But what
22 Mr. Shore didn't calculate is that that's out of the \$260
23 million that was the allowed claim; that the parties expressly
24 agreed at the disclosure statement hearing in connection with
25 the voting order, which their clients did not attend or object

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

52

752ndelN

Argument

752ndeln.txt

1 to, they got a vote in the amount of their agreed claim.

2 So 168 of 260 properly voted, which is 65 percent of
3 the total number of bondholders' votes available. Of that
4 amount, 97.35 voted in favor of the plan.

5 Your Honor, he's quite right, the plan -- and I
6 wouldn't quite use his terminology -- the plan vote absolutely,
7 positively was a referendum on the deal. That was its
8 intention in part. The order provided that the transaction was
9 incorporated into the plan. To make sure that they could not
10 be robbed of plan protections, we even agreed the deal could
11 never go effective unless the plan went effective, which is why
12 you don't hear them pressing their sub rosa plan argument
13 anymore, because, of course, as the bankruptcy court expressly
14 found, exactly as requested from the parties in the opening
15 words of the approval motion way back in March, this is a
16 request to a settlement and have it be incorporated into
17 Delta's plan of reorganization.

18 So now let's look at the four factors.

19 Having seen a very full and fair day in court below,
20 which included all the depositions they asked for, extensive
21 interrogatories, over 10,000 pages of discovery, and they put
22 on video excerpts with sound for the bankruptcy court with
23 screens and multimedia, this was not any rushed hearing by any
24 stretch of the imagination.

25 Before I hit the four factors, your Honor, again, they

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

53

752ndeln

Argument

1 didn't even attach to their papers the bankruptcy court had a
2 stay hearing and heard argument and was an extremely robust

752ndeln.txt

3 awareness of the underlying facts.

4 THE COURT: I have read the hearing on the stay, I
5 have read the Judge Hardin's decision on the stay.

6 MR. HUEBNER: OK.

7 THE COURT: As you all know, the argument that the
8 appellants didn't attach the stay hearing was made to me, and I
9 asked for the stay hearing even prior to the time of receiving
10 all of the papers in opposition.

11 I can't recall who actually provided it, but both
12 sides knew that it wasn't provided in the original papers and
13 it was provided promptly thereafter. Whether it was a problem
14 in terms of getting it transcribed promptly or whatnot, there
15 is nothing not disclosed by not including the stay hearing
16 transcript because it's plain that I would eventually read the
17 stay hearing transcript.

18 Go ahead.

19 MR. HUEBNER: Sure. Your Honor, I guess then let me
20 turn to the merits, which is many of the findings about whether
21 or not the extraordinary relief of an 8005 stay is warranted
22 are, of course, factual findings.

23 Where is the harm? Where is the public interest?

24 We think it is important that the Court that actually
25 heard the entire underlying matter and took in all the evidence

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

54

752ndeln

Argument

1 made findings, factual findings, that were rather
2 overwhelmingly in our favor.

3 Let me hit the four factors very quickly. On
4 irreparable harm, your Honor, I was going to read in a very

752ndeln.txt

long quote from that transcript where Mr. Lauria, the senior partner on this matter, emphatically made it clear that his view was that it was perfectly clear that no possible mootness argument with respect to KCAB or UMB could lie.

THE COURT: I read that, and I read the papers on that.

MR. HUEBNER: Understood, your Honor.

So let me move to the next point. It is a mathematical point, your Honor.

Just so the record is clear, again, I think their math may be a little off. They own \$51 million of bonds. They are going to get about \$30 million under the settlement. So when they say their maximum harm is \$30 million, I think they mean \$20 million, because I think they're getting 30. There's 20 left. Of course, they only paid about 35.

I just want the record to reflect that we don't agree that if anything further happens on this, their measure of damages may well not be capped. It's a very small number of dollars.

But as to irreparable harm, they have two large creditworthy parties that they say they can still sue. The

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

55

752ndeln Argument

mere fact that they might lose in their minds one of their many, one of their three defendants we believe is not irreparable harm.

Second, your Honor, and this point is made in the papers, so I will really hit it only very quickly, irreparable harm requires that you have a real thing that you are going to lose forever.

752ndeIn.txt

8 we believe that the record is clear that there is no
 9 better option for them, that they did not challenge that this
 10 was a fair and reasonable settlement, that the evidence taken
 11 in by the bankruptcy court proved that, frankly, the downside
 12 risk was much greater than upside risk, and I think that the
 13 right to chase causes of action that are very likely without
 14 merit is not the kind of thing that justifies the extraordinary
 15 remedy of a stay under 8005.

16 I won't repeat the very extensive evidence I referred
 17 to about there being no other possible tenants, and the rent
 18 here being higher than what other people, rent equivalents were
 19 paying, and this was deemed prepaid rent by everybody. But
 20 there was a lot of discovery and a lengthy hearing. The
 21 bankruptcy court expressly found, and this is in his written
 22 decision as a factual matter, that the settlement agreement to
 23 this -- I quote, "The settlement agreement appears to this
 24 Court to be clearly in the best interests of both Delta and the
 25 bondholders."

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

56

752ndeIn

Argument

1 He also found the terms of the settlement agreement
 2 also appear to be favorable to the bondholders and went on to
 3 note that it is virtually certain the court would sustain
 4 Delta's rejection motion.

5 So, your Honor, they are not going to be harmed
 6 because a court has already found that this is a very good deal
 7 for them and found it after they had an opportunity, which they
 8 declined, despite having gone and made us produce huge amounts
 9 of evidence to them to try to let them uncover facts that

752ndelN.txt

suggested that it was a bad deal.

The bankruptcy Court found as factual matter -- or just found maybe it is not a factual matter. It bears repeating that the objectors have not argued that the settlement is not beneficial to the bondholders.

Prong two, your Honor, their burden to prove -- prove -- that the stay will not cause any harm to any other party.

Your Honor, I would note that for prong one the standard is irreparable harm. They have to prove their own harm is irreparable, whereas prong two is that our harm only has to be substantial. Of course, the bankruptcy Court found that there is a, quote, tremendous potential for irreparable injury to the other parties if the settlement cannot and does not close on 10:00, May 3.

Your Honor, that harm comes from the fact that there

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

57

752ndelN

Argument

is about a quarter of a billion dollars of securities that could well be volatile, that people may not get for two months.

If those securities go down, God forbid, you know, 20 percent, those bondholders, the 97.35 of the voters that wanted this deal, will never be able to get back in that case \$50 million of lost value. That is irrevocably gone because the stay that this court issued locked them out of getting it tomorrow, which they so desperately negotiated for and was an absolutely central part of the deal.

Secondly, your Honor, besides the harm in the meantime, there is the harm of the deal dying.

Your Honor, I already walked through those provisions.

752ndelN.txt

13 I won't belabor the point, but I think the document frankly is
 14 clear on its face. The closing date being no later than the
 15 initial distribution date is a key term of the deal. The order
 16 being modified on appeal is an immediate walk-way right.

17 Your Honor, the next point, I would also note, your
 18 Honor, there is law on this. There is actually law on this
 19 from this very court.

20 In two of the court's three published opinions in T.R.
 21 Acquisition Corp., at page 637, and in Bogdanovich at *7 this
 22 Court expressly found that a delay in consummating a
 23 transaction and the possibility of losing a profitable
 24 transaction was harm, and in the second case, that granting the
 25 stay would "further delay . . . any possible recovery from the

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

58

752ndelN

Argument

1 debtors."

2 So the Southern District feels pretty clearly that
 3 delaying people's distributions and putting their deals at risk
 4 is harm. With all due respect, I don't think either of those
 5 cases involved a quarter of a billion dollars of publicly
 6 traded securities that were at the heart of the deal.

7 Then there's the third harm, your Honor, which is that
 8 if a stay goes through and this deal ends up being terminated,
 9 say, for example, the stock does plummet and the value that the
 10 majority bondholders were expecting from the deal evaporates in
 11 large part, they might very well rethink this and say, now the
 12 consideration that we thought was \$250 million is \$170 million
 13 and at 170 there's no deal because that's -- now we need to go
 14 back to war and pursue all options.

752ndel\n.txt

15 THE COURT: That depends on whether they have the
16 right to walk away from the deal simply because of the
17 existence of the stay.

18 MR. HUEBNER: Agreed, your Honor, or the closing not
19 taking place when expressly required. I agree, your Honor.
20 That's a question under the document.

21 But, your Honor, here's the real critical third harm,
22 which is if they get a stay and the deal doesn't consummate, we
23 lose our appellate rights.

24 The many, many parties that prevailed below at two
25 different hearings, the majority bondholders, the debtors, the

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

59

752ndel\n

Argument

1 committee, the airport, the trustee, we lose our right to have
2 the order affirmed on appeal, and we lose our bargain because
3 the deal has gone away.

4 with all due respect, if it is right that the one side
5 or other needs to take those risks, I certainly don't think
6 that it is appropriate for it to be our side.

7 Prong three, your Honor, likelihood of success.

8 Your Honor, I think your colloquy has addressed the
9 jurisdiction point, so I will neither quote from the transcript
10 nor belabor the point at all.

11 We, of course, understand that jurisdiction can't be
12 waived, but we are here on an emergency motion where they have
13 to prove, in your court's ruling three times, a strong showing
14 of success on the merits and getting the thing reversed.

15 And the jurisdiction argument can't go from "we admit
16 it and the lower Court found it was frivolous" to "it was such
17 a gross error it justifies an emergency stay" in the course of

752ndelN.txt

18 two weeks.

19 Your Honor, I'm very happy to discuss the Zale case
20 from the Fifth Circuit on the merits because I think it exactly
21 illustrates the fallacy of what's going wrong.

22 In Zale, your Honor, the underlying original document
23 had no possible -- let me not overstate it -- had no connection
24 to the debtors. The debtors were not liable on it. They
25 didn't have identification rights under it.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

60

752ndelN

Argument

1 Pursuant to a brand-new settlement agreement reached
2 during Chapter 11, for the first time the settlement created
3 obligations of the debtor in connection with that document.

4 If those were our facts, your Honor, if the indenture
5 had no prior connection to Delta and if we were not previously
6 liable for any amounts due thereunder and if we were in the
7 Fifth Circuit, and if, like in Zale -- and it is on the first
8 page of the opinion -- someone who stuffed in the injunction in
9 the middle of the hearing, with no notice to anybody, I would
10 agree with them that they might be right.

11 But, your Honor, not one of those things is true. In
12 fact, it's hard to even dream of a fact pattern more different
13 than Zale.

14 For 15 years Delta and only Delta has made every
15 single payment due under this indenture. Tens and tens and
16 tens of millions of dollars.

17 Moreover, as the court expressly found and the
18 documents make screamingly clear, payments from Delta under the
19 lease or the guarantee are the only source of payments under

752ndelN.txt

20 this indenture. Delta has substantial indemnification
21 obligations.

22 So to say that this is on some unrelated document and
23 we're trying to bootstrap it into the Delta bankruptcy case, we
24 were very restrained. We never used "sheer fantasy" or "aura
25 of unreality" in any of the our pleadings to your Honor, but it

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

61

752ndelN

Argument

1 is difficult to avoid them on this individual point.

2 THE COURT: Try harder.

3 MR. HUEBNER: Sorry, your Honor.

4 I will not repeat any of the documentary provisions in
5 KCAB's or the indentured trustee or our pleadings that make it
6 clear that Delta and in large part only Delta is liable, and
7 therefore to claim that there is no, quote, conceivable effect
8 on the Delta bankruptcy is without merit.

9 THE COURT: Better.

10 MR. HUEBNER: Your Honor, at bottom, they keep trying
11 to tell the Court that debts of KCAB are being discharged in
12 someone else's bankruptcy. In their brief they again tell you
13 that you we're improperly trying to "cancel 417 million dollars
14 of the airport's debt."

15 This is totally untrue. As everyone I think in the
16 courtroom knows, this is a nonrecourse municipal instrument and
17 is not the debt of KCAB. Mr. Lauria made that clear at the
18 stay hearing below at page 16.

19 THE COURT: I understand. I don't think that that is
20 disputed --

21 MR. HUEBNER: OK.

22 THE COURT: -- that it is not the debt of KCAB.

752ndeln.txt

23 There may be relet obligations and the like, but the
24 other side has made it very clear that they're not arguing
25 that.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

62

752ndeln

Argument

1 MR. HUEBNER: OK. Thank you, your Honor.
2 Their second claim of gross error is the indenture.
3 Your Honor, given the time available, I am not going
4 to go into a long discourse on the indenture. It was very
5 extensively addressed below.
6 I think that there is an awful lot of case law and a
7 very large number of sections as well as logic that make it
8 clear that Judge Hardin got it right, but I would note that one
9 provision that he did not cite which on some level is a savings
10 clause for the entire issue.
11 THE COURT: Ambiguity given to the trustee?
12 MR. HUEBNER: Yes. Under Section 1010.
13 THE COURT: Yes. I have that.
14 MR. HUEBNER: Thank you, your Honor.
15 Your Honor, they're right. He kept citing 316 all
16 throughout his entire argument to you after having admitted in
17 the first two minutes that it didn't apply.
18 But let's assume that the TIA did apply. There's lots
19 of cases and even their own law review articles make it clear
20 that bankruptcies override because of the reality recognized by
21 Judge Hardin that it is not the trustee that took away
22 principal and interest, it not the settlement agreement that
23 compromised their right to payment; it's Delta's Chapter 11 and
24 Delta's rejection power.

752ndeIn.txt

25 So your Honor was quite right to ask Mr. Shore that

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

63

752ndeIn Argument

1 there is no indenture, there is no supplemental indenture,
2 there is no amendment to the guarantee, there is no amendment
3 to the indenture.

4 That's right, your Honor. The documents have been
5 shattered by Chapter 11. What the trustee did with extreme
6 diligence was negotiate for the best possible recovery in light
7 of the reality.

8 This settlement agreement does not take away principal
9 and interest. Delta's insolvency and statutory rights as the
10 only economic obligor on this document did that on September
11 14, 2005.

12 Your Honor, before I forget, I want to hit this point,
13 they try to separate jurisdiction from, quote, power.

14 THE COURT: You are just about out of time.

15 MR. HUEBNER: I would note that Drexel and Manville
16 and this court's ruling in Bartel and Metromedia, they all say
17 that true third-party releases, not the kind we have here, are
18 in many circumstances A-OK.

19 So, since what we have here is a much more moderate
20 subset of third-party release, as set forth in our papers,
21 clearly the Second Circuit and this court believe that once
22 there is jurisdiction, there is, quote, power to enter into
23 arrangements of this nature because those courts and this court
24 all so found without pointing to a specific code provision.

25 Your Honor, the last thing that I think I would like

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

752ndelN.txt

♀

64

752ndelN

Argument

1 to hit is -- I will skip over the fourth factor which is the
2 public interest because I think that, frankly, the other
3 parties have a lot to say and are probably the more logical
4 spokesmen about aviation and the traveling public and the
5 governmental interest and all that.

6 Let me just go all the way to the bond, because while
7 we think that they have no entitlement to a stay and they meet
8 none of the four factors, let alone all four, the simple
9 reality is that the nature of a bond is to protect the other
10 side, to protect us from our potential losses.

11 In fact, the case that they quote to your Honor more
12 times than any other, the Adelphia decision, states clearly
13 that, "The court should set a bond at or near the full amount
14 of the potential harm to the nonmoving parties."

15 The fact that their harm is very small probably shows
16 that they certainly don't deserve a stay when one puts the two
17 sides on a scale.

18 THE COURT: OK. I have your argument on the bond.

19 MR. HUEBNER: With that, your Honor, I will have
20 concluded.

21 THE COURT: OK. There are several other parties if
22 any of you would like to address me, briefly.

23 OK.

24 MR. BOTTER: Good evening, your Honor. David Botter
25 with Akin Gump Strauss Hauer & Feld on behalf of the Post

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

65

752ndelN

Argument

752ndelN.txt

1 Effective Date Committee.

2 The Post Effective Date Committee is the successor to
3 the official committee of unsecured creditors in the Delta
4 Chapter 11 cases. Your Honor, the committee during those cases
5 represented the holders of approximately \$15 billion of
6 unsecured claims in Delta and its affiliates.

7 In reaction to some of the things Mr. Shore said
8 today, I can tell you that probably every single one --
9 actually, I can tell you certainly every single one of those
10 unsecured creditors would like to have received payment in
11 full.

12 Unfortunately, that is not happening in the Delta
13 case. I can tell your Honor that there is a major subset of
14 those creditors that were counterparties to executory contracts
15 with the debtors, and I can tell you with certainly as well,
16 your Honor, that every single one of those counterparties to
17 those executory contracts, just like Mr. Shore said, wanted
18 their leases to be assumed.

19 And unfortunately, your Honor -- or fortunately --
20 part of the fiduciary duty of the debtors in a chapter 11 case
21 as well as a creditor's committee is to examine those types of
22 executory contracts and to make a determination where it is
23 appropriate for a debtor to use the power authorized by
24 Congress under Section 365.

25 That is exactly what Delta and the committee did in

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

752ndelN

Argument

66

1 this case with respect to this particular contract. They
2 reviewed the contract, and they reviewed the rates and they
3 said these rates are too high. And Delta exercised its power

752ndelN.txt

4 under Section 365 as authorized by Congress and it sought
5 rejection of that contract.

6 As happens in every major Chapter 11 case that has
7 ever occurred, there was a settlement conversation that
8 followed the filing of that motion, and Delta entered into a
9 settlement conversation to adjust its rates to market rates
10 under the contract, to do exactly what Congress intended it to
11 do when it authored Section 365 of the Code.

12 That's what happened here. They negotiated the better
13 deal by virtue of their rejection power under Section 365 of
14 the code.

15 Your Honor, the airline business is a very difficult
16 business. I think we have all seen over the last bunch of
17 years many, many bankruptcies. Obviously, it is even more
18 difficult to be a creditor of a major airline. As a result of
19 incredibly easy access to information through the Internet,
20 airline pricing has become completely transparent. It's a
21 commodity. Airline tickets are commodities now.

22 What we've learned over the last couple of years is
23 that, for an airline to be successful in this type of
24 environment, that they have to cut costs.

25 Delta had a very successful Chapter 11. They cut a

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

67

752ndelN

Argument

1 lot of costs. And my clients, who will be the new owners of
2 Delta Airlines tomorrow, will be the beneficiaries of the
3 successful cost cutting of Delta Airlines.

4 THE COURT: The issue on the appeal and the likelihood
5 of success on the stay is whether there were errors made by the

752ndelN.txt

6 bankruptcy judge which warrant reversal on appeal and there is
 7 a sufficient likelihood of success on those claims to warrant a
 8 stay. I am really not being asked on the stay to examine the
 9 entire economics of the airline industry and the complicated
 10 difficulties that airlines and their creditors are facing today
 11 and over the coming years.

12 MR. BOTTER: Your Honor, I will cut to the chase that
 13 was leading to the argument with respect to the one factor that
 14 I want to talk about, which is substantial harm to the new
 15 owners of reorganized Delta. That is that substantial harm --
 16 your Honor recognized the volatility of the stock question. I
 17 won't talk about that at all, although that is harm to my
 18 creditor constituency as well.

19 The substantial harm that I would like to talk about
 20 is uncertainty. Despite the fact that people have talked about
 21 a ten-week stay period for this appeal, there will be
 22 uncertainty with respect to Delta's second largest hub.

23 That uncertainty will have an impact on the value of
 24 the distribution made to my creditor body. That is harm, your
 25 Honor.

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

68

752ndelN

Argument

1 Additionally, your Honor, what I was trying to talk
 2 about, when I talk about the commodity nature of the airline
 3 business, when there is uncertainty the public is frightened.
 4 what we have learned throughout all of this case is that the
 5 public and travel agents when they are making their
 6 reservations to fly on an airline will say there could be a
 7 problem with Delta's occupancy.

8 THE COURT: The only risk is if the bankruptcy court
 Page 62

752ndelN.txt

9 got it wrong. If the bankruptcy court got it wrong, why
 10 shouldn't there be that risk? The alternative is to deny
 11 rights to appeal from an incorrect decision.

12 So you ask that in the name of certainty we deny
 13 appellate rights to a party that says the lower court was
 14 wrong?;, So cut off the rights to appeal and let the wrong
 15 decision prevail in the name of certainty?

16 MR. BOTTER: Your Honor, I think what we have heard
 17 today is that with respect to the likelihood of success I think
 18 that the much stronger argument is on the Delta side of the
 19 table.

20 So, in terms of certainty, what we are looking at here
 21 is the impact and the harm. What I am just speaking to is the
 22 harm to Delta in a situation where it appears as though the
 23 bankruptcy court made the right decision.

24 If in fact you stay this decision, what I have a
 25 problem with is not only do I lose value as a result of

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

69

752ndelN

Argument

1 volatility, but I also lose potential value because customers
 2 may not be willing to book on Delta through Cincinnati.

3 That is potentially substantial lost revenue and a
 4 substantial loss in the public eyes of Delta's franchise out of
 5 Cincinnati.

6 Delta did exactly what it was supposed to do. It
 7 renegotiated rates to make market rates in Cincinnati, to
 8 continue flying out of Cincinnati. That's what the public
 9 believes.

10 If your Honor finds, as I think we have all heard, as

752ndelN.txt

11 I said, that the likelihood of success is de minimus on the
12 bondholder' side, then the harm is not going to be de minimus
13 on our side. It's substantial and real.

14 That's the only point I was make trying to make, your
15 Honor. Thank you.

16 THE COURT: Thank you.

17 MR. KANNEL: Good evening, your Honor, William Kannel
18 for UMB bank. I will be mercifully brief. If I go up to ten
19 minutes, please shut me up.

20 Point number one, on likelihood of success on the
21 merits or substantial possibility of success on appeal,
22 whatever the standard du jour is, I am not going to take your
23 Honor through the trust indenture. I am going to point out
24 this is a settlement done in bankruptcy, and what the
25 appellants are arguing, that in bankruptcy bonds cannot be

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

70

752ndelN

Argument

1 restructured with a hundred percent unanimous written consent,
2 we disagree with that.

3 In fact, if you look at the legislative history of the
4 Trust Indenture Act, which isn't applicable here, but which is
5 instructive because it's what is replicated in 9.06 of the
6 indenture, the point of that provision is to push restructures
7 like this toward judicial scrutiny.

8 That's exactly what happened here. Your Honor, what
9 happened below is the trustee brought with Delta to the
10 bankruptcy court a settlement. The trustee would not
11 consummate the settlement unless it got a finding from the
12 bankruptcy court that the settlement was fair and reasonable to
13 all bondholders. We were more than happy to be told that we

752ndeln.txt

14 were wrong and get the judge to buy into a better recovery for
15 bondholders. That would have been delightful.

16 THE COURT: Do you agree on behalf of the trustee that
17 if I stayed the decision of the bankruptcy judge, any of the
18 parties to the settlement agreement have the right to walk
19 away?

20 MR. KANNEL: I agree that Delta or committee could
21 make that argument. Frankly, that scares the hell out of me
22 because I think this is a good deal for the bondholders.

23 THE COURT: What's your position?

24 Mr. Huebner told me that all of the parties who
25 negotiated this are in the room and they would all say that the

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

752ndeln

Argument

71

1 interpretation of this provision means that if there is a stay
2 anyone can walk away?

3 MR. KANNEL: We agree with Mr. Huebner that the
4 definition of final order is as your Honor read it and as he
5 reads it. That is, we were very concerned in negotiating the
6 settlement. A large portion of the value to the bondholders
7 was the distribution of the stock when the tens of thousands of
8 other creditors got the stock, and that we didn't want to be
9 held up by a rogue appeal, especially after a finding that the
10 settlement was fair and reasonable.

11 THE COURT: And that if there is a stay that
12 constitutes a modification on appeal so that it triggers the
13 ability of each of the parties to walk away?

14 MR. KANNEL: I think that is an argument that Delta
15 could make and we could make if we chose to do so.

752ndel\n.txt

16 THE COURT: Yes. But I think Mr. Huebner said he was
17 quite confident that any of the parties could terminate, walk
18 away. You say you are quite confident that any party could
19 make that argument, which is --

20 MR. KANNEL: Your Honor, I think we can terminate.

21 THE COURT: I'm sorry?

22 MR. KANNEL: I think we can terminate.

23 THE COURT: And they can terminate?

24 MR. KANNEL: And they can terminate if the closing
25 date doesn't happen.

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

72

752ndel\n

Argument

1 THE COURT: OK.

2 MR. KANNEL: Your Honor, back to likelihood of success
3 on the merits, in bankruptcy it can't be that a single
4 bondholder can derail a settlement which has received judicial
5 scrutiny and been upheld as fair and reasonable.

6 Let me talk very briefly about harm to them. What
7 they want, if you take them at their word, is an opportunity to
8 relitigate the issues that have been settled, in other words,
9 to come in after a year of negotiation of which they were on
10 notice and basically say that trustee got it wrong and the
11 court got it wrong.

12 I think that their ability to do better on the
13 settlement is remote or speculative at best and not the sort of
14 harm that should result in a granting of the stay.

15 On the other hand, and I will talk about this briefly
16 because I think your Honor clearly understands it, it was given
17 the definition of closing date and given what we've just talked
18 about in colloquy, a very important part of the consideration

752ndelN.txt

19 that this plan, consideration which is the bulk of the
20 settlement, the \$260 million claim be paid when other creditors
21 get it.

22 Frankly, your Honor, that is all I have.

23 One other point, your Honor. I will confirm for you
24 that at least from UMB's perspective the releases are a
25 critical and integral part of the settlement, and the repeated

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

†

73

752ndelN

Argument

1 threats, whatever the motivation is, in the last round of
2 briefing makes that only more clear.

3 Thank you, your Honor.

4 THE COURT: OK. Thank you.

5 MS. MELNICK: Thank you, your Honor. Very, very
6 briefly Selinda Melnick of Edwards Angell Palmer & Dodge for
7 the Kenton County Airport.

8 THE COURT: Before you begin, I should mention I did
9 mention on the phone call and I should have mentioned at the
10 beginning that I know people in all of your firms. I don't
11 believe I know any of the lawyers who have appeared here. I
12 know people in all or almost all of your firms, and nothing
13 about that affects anything that I do in the case.

14 But go ahead, Ms. Melnick.

15 MS. MELNICK: Thank you.

16 I'm sure the firm will be happy to know that they have
17 been heard of.

18 Your Honor, to go directly to your question about the
19 effect of the stay, I believe that the stay does give any of
20 the parties the right to walk away for the simple reason that

752ndelIn.txt

21 granting the stay undoes the settlement. There is no
 22 settlement with a stay for all of the reasons that have been
 23 mentioned and more.

24 The reality is that's what the 10 percent bondholder
 25 committee wants. They want a stay here because, once they have

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

74

752ndelIn

Argument

1 a stay, there is no settlement agreement. In effect, a stay
 2 breaches the settlement agreement. It eviscerates it, it
 3 obviates it on so many different levels.

4 Particularly in addition to the obvious effect of May
 5 3, with respect to the releases, clearly bargained for,
 6 considerable consideration given for them, perfectly legal,
 7 perfectly appropriate, perfect jurisdiction and power to grant
 8 them in this instance, and without the release there no
 9 settlement agreement.

10 So to stay the effect of the release, i.e., to permit
 11 suit to be brought against any of the parties potentially other
 12 than Delta obviously effectively dissolves the settlement.

13 There wouldn't be releases anymore. They would be
 14 stayed. The purpose of the release would go away. In fact,
 15 your Honor, on the issue of the releases, yes, they are
 16 absolutely crucial, but they also bring to mind another point
 17 that was made by appellants here that I think deserves a little
 18 bit of consideration, and that is their argument on the
 19 jurisdiction and power side effectively that there is no tie of
 20 the releases and the nondebtor parties to Delta. It is totally
 21 independent and, therefore, there is no jurisdiction.

22 well, if they felt that there was no tie, the airport
 23 and of the indentured trustee to Delta, it raises the question

752ndeln.txt

24 about why when they knew about the settlement being reached
25 even before the motion for approval. The 9019 motion was filed

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

75

752ndeln

Argument

1 by Delta, why they didn't go out to a court and seek to enjoin
2 the airport or the indentured trustee from entering into that
3 settlement agreement, from putting pen to paper. Because if
4 it's not tied to Delta and it's not related to Delta's
5 bankruptcy, they weren't stayed from doing that.

6 By not doing that, if they truly believe that that's
7 the case, rather than using it as an interesting argument here,
8 potentially they've waived the right to sue those parties.

9 That's just one major point, your Honor.

10 THE COURT: There would be an argument of laches
11 perhaps.

12 MS. MELNICK: Yes, exactly. That's the exact point,
13 is laches.

14 The last thing, your Honor, very briefly is -- the
15 other parties have touched on it. The prepaid rent, the \$85
16 million note is definitely consideration that KCAB is giving
17 and allowing to occur with no payments to it. It is in the
18 nature of prepaid rent. It is a settlement.

19 Again, what we're dealing with here is a settlement of
20 the issue of whether or not there were relet obligations and to
21 what extent there are relet obligations. The parties differ on
22 that issue. This is a settlement of it.

23 Indeed, as Delta and the others have shown, that
24 settlement amount far exceeds the rent that would otherwise be
25 attainable if any rent would be obtainable on a relet there.

752ndeln.txt

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

76

752ndeln

Argument

1 The underlying record is clear. The argument before
2 the Court below is clear, that there was not a possibility for
3 relet and definitely not a possibility for relet to any other
4 party at an amount that in any way bore any relationship to
5 what is left owing on the bonds, even if the airport, which it
6 does not, and the property of the airport, which it does not,
7 had any obligation with respect to those bonds.

8 Thank you, your Honor.

9 THE COURT: OK. Thank you.

10 Very brief reply.

11 MR. SHORE: Thank you, your Honor.

12 Let me first deal with the issue on the settlement
13 agreement and the walk rights, because I don't think anybody
14 was answering your Honor's question.

15 THE COURT: On the contrary. Each of them did.

16 MR. SHORE: But then they put qualifications in the
17 end.

18 THE COURT: No. Each one took away the qualification.

19 In fact, it was only Mr. Kannel who I think started
20 with some qualifications, and after further questioning and
21 considering his position became quite unqualified.

22 Each of the parties to the settlement agreement takes
23 the unqualified position that if the stay is entered under the
24 agreement, they all have the right to walk away.

25 MR. SHORE: OK. I heard the answer to that question

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

77

752ndelN
752ndelN.txt
Argument

1 came in, if the closing date does not occur. OK.

2 THE COURT: OK.

3 MR. SHORE: But under the terms of the agreement, the
4 terms of the agreement, the closing date doesn't occur if the
5 order is not final.

6 THE COURT: They were all unequivocal really, that if
7 there is a stay such that there is no closing tomorrow, May 3,
8 if there is a stay such that the securities to which the
9 bondholders would otherwise be entitled tomorrow is not made,
10 each of them takes the position they can walk away.

11 That's understandable. It may be parties may have
12 some different interests, but at the very least the bondholders
13 and the trustee for the bondholders may see the value of the
14 deal crater, as they say, and not to take the position that
15 they have no recourse except to wait for the Court to get
16 around to deciding this appeal, that they are just stuck with
17 consideration that may not be the consideration that they
18 agreed to, not to take the position that they could walk away
19 would be in its own way remarkable.

20 Isn't that right?

21 MR. SHORE: That doesn't make the agreement support
22 their claim.

23 THE COURT: OK.

24 MR. SHORE: If the agreement says that for a closing
25 date to occur -- let's go back to what counsel for the debtor

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

78

752ndelN
Argument

1 said.

752ndelN.txt

2 He said, well, we have an obligation to deliver the
3 stock on the closing date.

4 4.01 says the opposite. It says your executory
5 obligation, other than 3.02 and 4.03, doesn't become effective
6 until the settlement order becomes final. So that these
7 parties would stand up and say to your Honor, doom and gloom, I
8 have the right to walk, not one of them saying I will walk, but
9 saying I have the right to walk --

10 THE COURT: I explored with them the definition of
11 finality. In fact, it was an issue when I read the agreement
12 that appeared to support exactly what they said. Strange as
13 this definition of finality may be, their definition of
14 finality in this agreement provides for finality based upon the
15 filing of an appeal and the failure to have a stay.

16 MR. SHORE: Right.

17 The debate we got into was a question of, back and
18 forth in our respective arguments was a question of whether
19 right now, without a stay being issued, there is a final order.

20 I agree with you. This provision -- the debtor is
21 going to have to come to its own conclusions because it has an
22 order that says that you can do this. As to whether or not it
23 is final, that's their own burden to take up, but the issue
24 there is whether it's final now.

25 If it is not final now, we can stop talking about a

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

752ndelN

Argument

79

1 stay or anything else. They can't close unless they all agree
2 to waive the condition.

3 The issue now, though, is, if a stay is issued, there
4 is no reading of finality that says that the order is final.

752ndelN.txt

5 I think your Honor just said it. If a stay is issued,
 6 there is no final order. If there's no final order, nobody has
 7 an obligation to deliver on the closing date, and if you turn
 8 to the termination provisions, nobody has a right to walk until
 9 July 15.

10 So they took your Honor's invitation to get into a
 11 question with respect to is it final now with just the appeal
 12 pending and have tried to turn that into, if a stay is entered,
 13 the order still becomes final.

14 That's wrong. If the stay is issued, the order isn't
 15 final. Nobody has to do anything, and nobody can walk until
 16 July 15. That they would come up here and tell you, oh, I can
 17 claim the right and I have the right to walk if it's contrary
 18 to the agreement, that's not the responsibility of the
 19 bondholder.

20 If they want to violate their own agreement and all
 21 agree that that we can change the terms of the agreement to
 22 close this deal or all agree to walk away, that doesn't become
 23 the responsibility of the party who obtained the stay of the
 24 order approving this deal.

25 THE COURT: OK. Briefly.

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

80

752ndelN

Argument

1 MR. SHORE: The next issue with respect to relet
 2 rights, just so your Honor knows, it is in the facility
 3 agreement. It is 8.07 of the facility agreement if your Honor
 4 wants to look at it.

5 The problem we have with a couple of things -- again,
 6 it is an issue coming up on appeal. The testimony was very

752ndelN.txt

clear from the CEO of KCAB, when the question was asked:

"Now I understand what you have all done, so let me ask it this way. In approaching these other airlines about using the facilities here in Cincinnati, have you done so in the context of Delta leaving and presenting them with the possibility of having the complete use of terminal B as a hub or the gates of terminal B that were paid for with the proceeds of the bonds?"

"No."

So the concept that what ended up happening here was this is the best deal we can get is disputed. I don't want to sit down here today with your Honor thinking that what they did with respect to the relet proceeds or what Judge Hardin did, he said very clearly in his opinion, or in his discussion of the stay really, he said, I didn't look at the relet issue. That is not an issue. I was not here to make a determination with respect to relet rights, because that's not part of the 9019.

So when somebody stands up and says this was an issue for Delta, for the judge to resolve, that is not correct. When

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

81

752ndelN

Argument

counsel for the debtor says, our only right, the reason this is so important, and the reason why this is a bankruptcy, which allows us to do this is because really everybody knows your only right here is to get a lease payment from Delta, that's not right. The right here is to get rental proceeds from whoever is renting that.

If Delta went out of business five years ago and there was someone in here renting the terminal we would be getting those proceeds. It wouldn't be related to the fact that Delta

752ndelN.txt

10 was the original party to the lease. The mere fact that they
11 are a party to the lease now doesn't turn the issuer into a
12 debtor.

13 There are times when you prepack a bond issuer because
14 you can't get unanimous consent. You all agree and you go in
15 and you use the provisions of 1129 to cram it down.

16 THE COURT: OK. There's no question this isn't that.
17 So go ahead. Finish up.

18 MR. SHORE: To say that it is nonrecourse and
19 therefore Delta is the issuer, is to -- which is essentially
20 what's going on here. There is a way to do that, your Honor.
21 It was done in the United Airlines bankruptcy in a case that
22 was cited to you. It's called a lease recharacterization. You
23 say really, the rental stream I was paying you was just
24 servicing rent. I, Delta am the issuer of these bonds.

25 MS. MELNICK: Objection, your Honor. We're dealing

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

82

752ndelN

Argument

1 with the settlement. This is not an appeal of a decision yea
2 or nay on relet rights. It is a settlement.

3 THE COURT: All right. Finish up.

4 MR. SHORE: My point being that there is no precedent
5 for because a debt is nonrecourse and is only at this time
6 against the assets of the debtor, that makes it a matter for
7 the bankruptcy court to deal with.

8 The way you get a bankruptcy court to deal with an
9 issuer is the issuer files. That's how you deal with it. So I
10 come to the end, and I will just say it because I haven't heard
11 it, nobody has said to your Honor, they didn't say below, they

752ndel\ntxt

12 haven't said in their papers, they can't say today what
 13 statutory provision was the bankruptcy court operating under
 14 when he made a declaration that everything here is perfectly
 15 OK, that an injunction can issue, and that we can be coerced
 16 into giving releases to our indentured trustee and issuer.
 17 They didn't cite anything.

18 THE COURT: OK.

19 Thank you.

20 I appreciate the arguments. I'm going to take five
 21 minutes.

22 Then I will be back.

23 (Recess)

24 (Continued on next page)

25

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

83

752ndel\ntxt

Decision

1

2 THE COURT: Good afternoon, all.

3 All right. I am prepared to decide.

4 I appreciated the briefing and the arguments.

5 The appellants, a group of Bondholders who hold
 6 approximately \$50 million in face amount of bonds issued by the
 7 Kenton County Airport Board ("KCAB") pursuant to a 1992 Trust
 8 Indenture, bring this motion for a stay pending appeal of a
 9 settlement order entered by the United States Bankruptcy Court
 10 for this district approving a settlement among Chapter 11
 11 debtor, Delta Airlines, KCAB, and UMB Bank, N.A. as trustee for
 12 the Bondholders under the 1992 Indenture. The appellants
 13 objected to the proposed bankruptcy court order approving the
 14 settlement, but after limited expedited discovery and extensive

752ndelN.txt

15 argument, the Bankruptcy Court entered the settlement order at
 16 issue here on April 24, 2007, with a written decision following
 17 on April 25, 2007. The appellants immediately filed a notice
 18 of appeal and a motion requesting an expedited appeal.

19 On April 26, 2007, the appellants orally moved the
 20 Bankruptcy Court for a stay pending appeal, and the Court
 21 denied that motion orally with a formal order denying the
 22 motion following on April 27, 2007. The appellants now move
 23 this Court by way of an Order to Show Cause why a stay pending
 24 appeal pursuant to Federal Rule of Bankruptcy Procedure 8005
 25 should not be issued.

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

84

752ndelN

Decision

1 In considering a stay pending appeal of a bankruptcy
 2 order, the Court applies a four factor test involving: (1)
 3 whether the movant will suffer irreparable injury if the stay
 4 is denied (2) whether the nonmoving parties will suffer
 5 substantial harm if the stay is granted, (3) whether there is a
 6 strong likelihood, or alternatively, a substantial possibility
 7 of success on the merits of the appeal, and (4) whether a stay
 8 is in the public interest. See *In Re Adelphia Communications*
 9 *Corp.*, No. 02-41729 M47, 2007 WL 186796, at *4 (S.D.N.Y.
 10 January 24, 2007) (citing *Hirschfeld v. Board of Elections*, 984
 11 F.2d 35, 39, (2d Cir. 1993)); *In Re Bogdanovich*, 00 Civ. 2266
 12 2000, WL 1708163, at *3 (S.D.N.Y. November 14, 2000). These
 13 factors are considered in turn, giving each its due weight in
 14 determining whether the Court's equitable power to issue a stay
 15 is warranted.

16 First, the appellants have failed to show a sufficient

752ndelN.txt

17 likelihood of irreparable harm, though there may be the
 18 possibility of some harm if the stay is denied. The appellants
 19 argue primarily that a denial of a stay may render their appeal
 20 subject to dismissal as equitably moot because Delta could
 21 begin making distributions under the terms of the settlement
 22 agreement as early as May 3, 2007, and after those
 23 distributions the Court would be unable to fashion a remedy
 24 should the appeal succeed. However, the appellant stated to
 25 the Bankruptcy Court and have repeated in these proceedings

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

85

752ndelN

Decision

1 that they do not believe their claims against KCAB, the
 2 trustee, and any other nondebtors are likely to be dismissed as
 3 equitably moot. (See April 26, 2007, Bankruptcy Court Stay
 4 Hearing Transcript at 6, attached as Exhibit A to declaration
 5 of Andrew Dean, May 1, 2007). Their equitable mootness
 6 argument therefore appears to pertain only to their claims
 7 against the debtor Delta. However, the appellants have not
 8 pressed arguments on the merits, at least in their papers,
 9 against Delta on this appeal because they assert in their reply
 10 that they "are now not seeking to recover principal and
 11 interest on the bonds from the Airport or Delta . . . , but
 12 rather to sue for a breach of Sections 9 and 12 of the
 13 Indenture by the Airport and the Trustee." (Appellants Reply
 14 Memo of Law at 7). Indeed, the appellants suggest as possible
 15 relief that this court enter an order staying the provisions of
 16 the settlement order that delivers a release to the Airport and
 17 the Trustee. (Appellants' Brief at 4.) Moreover, it is worth
 18 noting that if the appellants succeeded in their argument that
 19 the Bankruptcy Court lacked jurisdiction to enter the

752ndeln.txt

20 settlement order, it is unlikely that their appeal would be
 21 moot. Therefore, the argument that the appellants would be
 22 irreparably harmed if the stay is denied because their appeal
 23 would be rendered equitably moot is a weak one.

24 The appellants' argument for irreparable harm is also
 25 speculative. See *In Re Bogdanovich*, 2000 WL 1708163 at *6 ("To

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

86

752ndeln

Decision

1 establish irreparable harm, a party must demonstrate 'an injury
 2 that is neither remote nor speculative, but actual and
 3 imminent'" (quoting *Tucker Anthony Realty Corp. v. Schlesinger*,
 4 808 F.2d 969, 975 (2d Cir. 1989)). To the extent that the
 5 plaintiffs are attempting to argue that the value of their
 6 investments has been diminished or harmed in some way or will
 7 be harmed during the pendency of the appeal, there is no such
 8 showing. If the appellants' appeal succeeded, it would lead to
 9 further litigation, but the appellants have not established
 10 that this strategy would likely result in a more favorable
 11 settlement for them. In fact, the Trustee and the majority of
 12 Bondholders who supported the settlement have argued without
 13 substantial contradiction that the settlement provides fair and
 14 reasonable consideration. The appellants have therefore failed
 15 to establish that a denial of the stay would make them worse
 16 off economically. In any event, they have made no showing that
 17 any loss of economic benefit would be "irreparable."

18 Second, the parties resisting this motion have made a
 19 persuasive showing that they would suffer substantial harm if a
 20 stay pending appeal were granted. A stay would deprive the
 21 Bondholders of a substantial benefit of the settlement that

752ndelN.txt

22 would allow them to receive a substantial distribution of
 23 securities from Delta on May 3, 2007, the same date that other
 24 creditors would receive distributions under Delta's approved
 25 reorganization plan. And therefore, to avoid future market

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

87

752ndelN

Decision

1 risk, Delta and the other parties opposing this motion have
 2 argued compellingly that the value of these securities could
 3 decrease after the bulk of the distributions to other creditors
 4 take place and, therefore, that the Bondholders could lose a
 5 substantial portion of their bargained for value under the
 6 settlement agreement. In any event, the Bondholders bargained
 7 for the right to have their securities and to be able to decide
 8 whether to keep them or sell them. Any stay would deprive them
 9 of that consideration by holding up the distribution of their
 10 securities.

11 Furthermore, each of the parties to the settlement
 12 agreement, who all oppose the stay, maintain that under the
 13 settlement agreement each of those parties can terminate the
 14 settlement agreement if there is a stay. That is at least a
 15 plausible argument under the settlement agreement, and the
 16 enormity of that consequence would be irreparable injury.

17 While the severity of the risk that the settlement
 18 could be imperiled by a stay is unclear at this stage, any risk
 19 that the settlement could dissolve presents the possibility of
 20 a substantial harm because the settling parties agree that the
 21 negotiated settlement is in the best interests of both Delta
 22 and the Bondholders.

23 The substantial harm to the Bondholders that would
 24 result from their inability to monetize their stake of the

752ndelN.txt

25 distribution immediately and thereby avoid market risk together

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

88

752ndelN

Decision

1 with a possibility that the settlement itself could fall apart
2 weighs against the grant of a stay.

3 The appellants raise the possibility of granting less
4 onerous relief by staying only the portion of the order
5 delivering releases of claims against KCAB and the trustee, or
6 by specifically putting KCAB and the trustee "on notice" that
7 their releases are subject to vacatur on appeal regardless of
8 whether the settlement has closed. The first alternative would
9 result in the alteration of a material term of the settlement
10 and would contravene Section 3.01 of the Settlement Agreement,
11 which provides that all provisions of the settlement agreement
12 are essential and nonseverable. Staying only some terms would
13 likely require staying the entire agreement and indeed imperil
14 the carrying out of the Settlement Agreement. The second
15 alternative would amount to an advisory opinion and is plainly
16 inappropriate at this stage. All parties are free to research
17 the law and assess their legal positions. Neither alternative
18 can prevent the risk of substantial harm to the Bondholders and
19 the other settling parties.

20 Third, having reviewed the Bankruptcy Court's thorough
21 decision approving the settlement agreement, the Court finds
22 that the appellants have failed to establish a likelihood of
23 success on appeal. The appellants' argument that the
24 Bankruptcy Court lacks subject matter jurisdiction to enter the
25 settlement order is undercut by their concession in the

SOUTHERN DISTRICT REPORTERS, P.C.
Page 81

752ndel\ntxt
(212) 805-0300

♀

89

752ndel\ntxt

Decision

1 Bankruptcy Court's April 19, 2007, hearing on the motion to
2 grant the Settlement Order that the Court had subject matter
3 jurisdiction under 28 U.S.C. Sections 1334(b) and 157 to rule
4 on the motion. The Bankruptcy Court plainly had jurisdiction
5 under Section 1334(b) to approve the settlement binding
6 nondebtors because the settlement had more than a "conceivable
7 effect" on the bankruptcy estate, as required in this circuit;
8 it in fact had a very clear effect on Delta's obligations. In
9 Re Cuyahoga Equipment Corp. 980 F.2d 110, 114 (2d Cir. 1992)
10 (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir.
11 1994)); See Also In Re WorldCom Inc. Securities Litigation, 293
12 B.R. 308, 319 (S.D.N.Y. 2003). The appellants attempt to
13 ignore the centrality of Delta to the indenture because KCAB is
14 named as the issuer, but the Bankruptcy Court found that the
15 indenture along with the associated Lease Agreement and
16 Guaranty clearly show that the bonds are nonrecourse with
17 respect to KCAB and that Delta's rent obligations provide the
18 only source of payment. (See, e.g., Indenture, Sections 2.05,
19 7.01, attached as Exhibit G to Dean Declaration; Lease
20 Agreement, Section 4.03, attached as Exhibit H to Dean
21 Declaration.)

22 As the Bankruptcy Court explained, both KCAB and the
23 Bond Trustee are direct creditors of Delta, KCAB based on the
24 lease and the trustee based on Delta's guarantee of the lease,
25 which is the only source of funding for the bonds. All three

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

90

752ndel\ntxt

Decision

752ndelN.txt

1 of the agreements are inextricably related to each other, and
 2 the settlement resolves the claims among the parties arising
 3 from Delta's effort to reject the lease in the bankruptcy case.

4 The appellants argue particularly that the Bankruptcy
 5 Court lacked jurisdiction to approve the releases of claims
 6 against the nondebtors which are contained in Section 3.02(f)
 7 of the settlement agreement. The appellants have failed to
 8 establish that this claim is likely to succeed on appeal. The
 9 appellants fail to address cases such as *In Re Drexel Burnham*
 10 *Lambert Group, Inc.*, 960 F.2d 285, 293, (2d Cir. 1992), which
 11 have allowed releases of claims against third parties where
 12 those releases played an important part in a debtor's
 13 reorganization plan. See *Bartel v. Bar Harbor Airways, Inc.*,
 14 196 B.R. 268, 274 (S.D.N.Y. 1996). The appellants' reliance on
 15 *In Re Metromedia Fiber Network Inc.*, 416 F.3d 136 (2d Cir.
 16 2005) is misplaced. Unlike the releases in Metromedia, the
 17 releases of claims against KCAB, Delta, and the Trustee at
 18 issue here are narrowly drawn and are necessary to prevent
 19 relitigation of precisely the claims that were negotiated and
 20 resolved by the Settlement Agreement. It is furthermore clear
 21 that the releases at issue comprise valuable consideration for
 22 KCAB and the Trustee in return for their agreement to give up
 23 indemnification rights against Delta and therefore the
 24 releases. Therefore, the releases are of the kind that
 25 Metromedia would consider as acceptable. Moreover, the

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

91

752ndelN

Decision

1 releases are part of the Settlement Agreement that was entered
 2 into by the Trustee on behalf of the Bondholders. The Trustee

752ndeln.txt

was authorized to settle claims by the majority of the Bondholders pursuant to the terms of the Indenture. Therefore, the releases were consensual releases which were recognized as authorized in Metromedia. See Metromedia, 416 F.3d at 142.

To the extent that the appellants argue that the so-called nonimpairment provision of the Indenture barred the Bankruptcy Court's actions, its position is unlikely to succeed on appeal. Taking a full view of the Indenture's provisions, it appears likely that the Bankruptcy Court correctly found that the indenture did not bar it from approving the settlement, particularly in view of the agreement by the Trustee at the direction of a majority and principal amount of the Bondholders to enter into the settlement, and the approval of the reorganization plan, which incorporates the settlement agreement by a large majority of the Bondholders.

The Bankruptcy Court was also likely correct in finding that any impairment of the Bondholders' ability to receive payment within the meaning of Section 9.06 of the Indenture was due to Delta's default and protection under the bankruptcy laws, not any act of the Issuer or Trustee.

The Bankruptcy Court was also likely correct that the trustee had the right under Section 9.04 of the Indenture following Delta's default to accept directions from the

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀

92

752ndeln

Decision

majority of the Bondholders and that it was authorized to do so on behalf of all Bondholders.

Finally, the public interest factor weighs heavily in favor of denying the stay. It is undisputed that the public interest favors the expedient administration of bankruptcy

752ndelN.txt

6 proceedings. In *Re Savage and Associates*, P.C., 05 Civ. 2072
 7 2005 WL 488643 at *2 (S.D.N.Y. February 28, 2005.) See Also In
 8 *Re Metiom Inc.*, 318 B.R. 263, 272 (S.D.N.Y. 2004). The
 9 overwhelming number of Bondholders have approved the
 10 settlement. There is no dispute that the settlement is in the
 11 best interests of Delta. The appellees also argue persuasively
 12 that the settlement is in the best economic interests of the
 13 Bondholders, and the appellants have avoided making any
 14 substantial argument that the settlement is not in the best
 15 economic interests of the Bondholders. The appellants stand
 16 only on their asserted legal rights to object to the
 17 settlement, which rights are unlikely to be recognized.
 18 Moreover, the appellants have not provided any compelling
 19 support for their argument that this settlement would result in
 20 any instability in the financial markets. Rather, the
 21 substantial approval of the settlement and the plan reflect the
 22 fact that other participants in the process do not share their
 23 evaluation of the settlement.

24 Furthermore, the equities tip decidedly against the
 25 appellants in view of the fact, apparent from their April 25,

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

93

752ndelN

Decision

1 statement pursuant to Bankruptcy Rule 2019, that the
 2 overwhelming number of the appellants' bonds were bought after
 3 Delta entered into bankruptcy proceedings. Thus the appellants
 4 bought the bonds while they knew the income stream to pay the
 5 bonds was imperiled, and they continued to hold the bonds
 6 without objection while they were aware that the Trustee was
 7 engaged in settlement discussions.

752ndelN.txt

8 A consideration of all of the factors discussed above,
 9 none of which provides considerable support for the appellants'
 10 position, leads to the conclusion that a stay pending appeal is
 11 unwarranted.

12 The appellant's motion for a stay pending appeal is,
 13 therefore, denied.

14 So ordered.

15 To the extent that findings of fact and conclusions of
 16 law are required on denying a stay pending appeal, the
 17 foregoing constitutes the Court's findings of fact and
 18 conclusions of law.

19 So ordered.

20 There are two minor things.

21 I attempted to deal with this as expeditiously as
 22 possible so that all of you would have the opportunity to seek
 23 other review. I am sure that you can get the transcript from
 24 the court reporter. What I would do, I will issue tonight just
 25 a brief order that says for the reasons stated on the record

SOUTHERN DISTRICT REPORTERS, P.C.
 (212) 805-0300

♀

94

752ndelN Decision

1 the motion for the stay is denied.

2 Rather than to put you all now through the discussion
 3 of the timing of the appeal, I am perfectly prepared to listen
 4 to an expedited appeal, and you all had agreed without
 5 prejudice to timing of the appeal. Rather than discuss that
 6 with you now, would you all simply provide me a stipulation
 7 setting out what the timing of the appeal is, and after I get
 8 the stipulation I'll set down an appropriate argument date.

9 OK?

10

752ndel\l.txt

11 COUNSEL: Thank you, your Honor.

12 THE COURT: OK. Good afternoon, all. Thank you again
13 for the argument and your briefs.

14 (Adjourned)

15

16

17

18

19

20

21

22

23

24

25

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

♀